

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

BRYAN VELASQUEZ,

*Petitioner,*

vs.

JACK PALMER, *et al.*,

*Respondents.*

3:09-cv-00441-HDM-RAM

ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the Court on a *sua sponte* inquiry into, *inter alia*, whether the petition is time-barred because it was not filed within the one-year limitation period established in 28 U.S.C. § 2244(d)(1). This order follows upon the Court's earlier show cause order (#3) and petitioner's response (#6) thereto.

***Background***

Petitioner Bryan Velasquez challenges the sentences imposed under his Nevada state conviction, pursuant to a guilty plea, of one count of attempted sexual assault on a child under the age of 14 and one count of attempted lewdness with a child under the age of 14. The materials submitted reflect that the affected child was only six years old at the time of the sentencing. Petitioner alleges in the two grounds of the federal petition that his consecutive sentences on the two counts and his special sentence of lifetime supervision violate the Double Jeopardy Clause because he allegedly is being punished more than once for the same offense, on the basis that the two counts arise from one continuous act or event.

1 The background procedural history is set forth in the Nevada Supreme Court's April  
2 15, 2009, order (filed at #5), and is undisputed.

3 Petitioner's judgment of conviction was filed on December 6, 2001. Petitioner did not  
4 file a direct appeal.

5 On or about February 11, 2008, petitioner filed a *pro se* motion to correct illegal  
6 sentence in the state district court. As described by the state supreme court, petitioner  
7 alleged therein that "his conviction was unconstitutional because the two incidents for which  
8 he was convicted arose out of the same continuing event, that his sentences are illegal  
9 because they were ordered to run consecutively, and that the imposition of lifetime  
10 supervision constitutes an unconstitutional or illegal sentence."

11 The state district court denied the motion, and petitioner appealed. The Supreme  
12 Court of Nevada affirmed on April 15, 2009, on the following grounds:

13  
14 A motion to correct an illegal sentence may only challenge  
15 the facial legality of the sentence: either the district court was  
16 without jurisdiction to impose a sentence or the sentence was  
17 imposed in excess of the statutory maximum. Edwards v. State,  
18 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). "A motion to  
correct an illegal sentence 'presupposes a valid conviction and  
may not, therefore, be used to challenge alleged errors in  
proceedings that occur prior to the imposition of sentence.'" Id.  
(quoting Allen v. United States, 495 a.2d 1145, 1149 (D.C.  
1985)).

19 Based upon our review of the record, we conclude that  
20 appellant's requests fell outside the narrow scope of claims  
21 permissible in a motion to correct an illegal sentence. Appellant's  
22 sentences were facially legal, and the record does not support an  
23 argument that the district court was without jurisdiction in this  
24 matter. See 1999 Nev. Stat., ch. 105, § 23, at 431-32, 1999 Nev.  
25 Stat. ch. 105, § 49, at 470-72, and NRS 193.330(1)(a)(1).  
Appellant entered a guilty plea to both counts, and appellant may  
not challenge the validity of the guilty plea in a motion to correct  
an illegal sentence. Further, the district was required to impose  
the sentence of lifetime supervision. See Nev. Stat., ch. 560, §  
11, at 2789-90. Therefore, the district court did not err in denying  
this motion.

26 April 15, 2009, Order of Affirmance, at 2.

27 Petitioner has not filed any other state proceedings challenging his conviction or  
28 sentence other than the above motion to correct illegal sentence.

1 Petitioner mailed the present federal petition to the Clerk of Court for filing on or about  
2 August 6, 2009.

### 3 ***Governing Law***

4 Under the Antiterrorism and Effective Death Penalty Act (AEDPA), in the context  
5 presented here, a federal habeas petition must be filed within one year after "the date on  
6 which the judgment [of conviction] became final by the conclusion of direct review or the  
7 expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Under Section  
8 2244(d)(2), "[t]he time during which a properly filed application for State post-conviction or  
9 other collateral review with respect to the pertinent judgment or claim is pending shall not be  
10 counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). The  
11 limitation issue may be raised by the district court *sua sponte*. *Herbst v. Cook*, 260 F.3d 1039  
12 (9<sup>th</sup> Cir. 2001).

### 13 ***Discussion***

14 The application of the AEDPA to this case is simple and straightforward. Under 28  
15 U.S.C. § 2244(d)(1)(A), the federal one-year limitation period, unless otherwise tolled, begins  
16 running after "the date on which the judgment became final by the conclusion of direct review  
17 or the expiration of the time for seeking such direct review." In the present case, the limitation  
18 period, unless otherwise tolled, therefore began running in this case after the thirty day time  
19 period expired for filing a direct appeal, *i.e.*, on Monday, January 7, 2002.

20 Accordingly, unless otherwise tolled, the time period for filing a federal petition in this  
21 case expired on January 7, 2003, six years and eight months before petitioner's filing.

22 Under 28 U.S.C. § 2244(d)(2), the federal one-year limitation period is statutorily tolled  
23 during the pendency of a properly filed application for state post-conviction relief or other  
24 collateral review. Petitioner's state court motion to correct illegal sentence, however, was not  
25 filed until on or about February 11, 2008, over five years and one month after the federal  
26 limitation period already had expired, absent other tolling.

27 Petitioner does not present any other basis for statutory or equitable tolling. He instead  
28 urges that the time for "direct review" for purposes of Section 2244(d)(1)(A) does not expire

1 in Nevada by the expiration of the time for taking a direct appeal because state law provides  
2 for other avenues for direct review which had not expired. He contends, in particular, that the  
3 remedy available under N.R.S. 176.555 of a motion to correct illegal sentence constitutes  
4 such “direct review,” and that the time for pursuing this remedy did not expire in his case until  
5 the state supreme court’s order of affirmance of the denial of his state court motion to correct  
6 illegal sentence.

7 The Court is not persuaded. The question of whether a state procedure constitutes  
8 part of “direct review” for purposes of Section 2244(d)(1)(A) or instead an “application for  
9 State post-conviction or other collateral review” for purposes of Section 2244(d)(2) is a  
10 question of federal law. *E.g., Summers v. Schriro*, 481 F.3d 710, 714 (9<sup>th</sup> Cir. 2007). In  
11 resolving this federal law question under the AEDPA, courts must look to how a state  
12 procedure functions in the state’s criminal justice system rather than the particular name that  
13 it bears. *Id.* How the State characterizes the proceeding is relevant but not controlling. *Id.*

14 Petitioner urges that a Nevada motion to correct illegal sentence constitutes a part of  
15 “direct review” for purposes of Section 2244(d)(1)(A) because Nevada state decisions  
16 distinguish the Nevada state procedural rules applicable to a motion to correct illegal  
17 sentence from those applicable instead to a state post-conviction petition. For example, a  
18 motion to correct illegal sentence is not subject to the limitation period applicable to a state  
19 post-conviction petition, and the motion may be brought at any time.<sup>1</sup> Petitioner maintains  
20 that because Nevada courts do not treat a motion to correct illegal sentence as a post-  
21 conviction petition under state practice -- and instead refer to the motion as a form of “direct  
22 attack” on the conviction under state practice -- the motion therefore must constitute a part  
23 of “direct review” for purposes of Section 2244(d)(1)(A).

24 How Nevada characterizes the motion under state practice, again, is not controlling,  
25 however. *Summers, supra*. More telling is that a motion to correct illegal sentence does not  
26 serve under Nevada criminal procedure as a substitute remedy for a direct appeal that

---

27  
28 <sup>1</sup>*E.g., Passanisi v. State*, 831 P.2d 1371, 1372-73 (Nev. 1992).

1 otherwise would not be available to the defendant. Petitioner did have a right to a direct  
 2 appeal – in which he could have raised the Double Jeopardy claim in question – but he simply  
 3 did not exercise that right. Petitioner cites no apposite state court authority characterizing a  
 4 motion to correct illegal sentence as the functional equivalent of an appeal (as opposed  
 5 merely to not being a state post-conviction petition under the particular Nevada statute  
 6 governing that remedy).<sup>2</sup> A prisoner filing a motion to correct illegal sentence is not entitled  
 7 to appointed counsel under Nevada practice as a matter of right as he would on a direct  
 8 appeal or other functional direct review equivalent. Moreover, the ability to bring a motion to  
 9 correct an illegal sentence under Nevada practice is not governed by the short, definite  
 10 deadlines that typify direct review. There instead is no time limit whatsoever. Construing a  
 11 Nevada motion to correct illegal sentence as a form of “direct review” thus would eviscerate  
 12 and essentially jurisprudentially repeal the federal one-year time-bar in Nevada because the  
 13 limitation period would not even begin to run unless and until the petitioner decided to file  
 14 such a motion – possibly, as in this case, many years after the conviction – and a decision  
 15 was rendered. Such a result clearly is not consistent with the Congressional decision in the  
 16 AEDPA to adopt a uniform one-year limitation period for federal habeas petitions.

17 The Court accordingly concludes that petitioner’s motion to correct illegal sentence did  
 18 not constitute part of “direct review” for purposes of Section 2244(d)(1)(A).<sup>3</sup> As petitioner  
 19 presents no other argument and given that the federal petition clearly was untimely, by  
 20 several years, the petition will be dismissed with prejudice. The Court therefore does not  
 21 reach any other issues in the case.

---

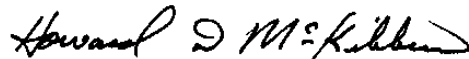
22  
 23  
 24 <sup>2</sup>The statement in the *Passanisi* decision cited in note 1 that a motion to modify sentence is a  
 25 “functional equivalent of a motion for a new trial” and a “direct attack on the decision itself” is not the same as  
 26 a statement that the motion to correct illegal sentence is the functional equivalent of a *direct appeal*. The fact  
 that a defendant potentially may be able under state practice to bring post-judgment motions challenging a  
 judgment of conviction years after entry of the judgment does not signify that such post-judgment motions  
 constitute part of “direct review” for purposes of Section 2244(d)(1)(A).

27 <sup>3</sup>*See also Tillema v. Long*, 253 F.3d 494 (9<sup>th</sup> Cir. 2001)(treating a Nevada motion to correct illegal  
 28 sentence as an application for State post-conviction or other collateral review under Section 2244(d)(2) in a  
 case where the petitioner did not argue instead for the application of Section 2244(d)(1)(A)).

1 IT THEREFORE IS ORDERED that the petition shall be DISMISSED with prejudice  
2 as untimely.

3 The Clerk of Court shall enter final judgment accordingly against petitioner and in favor  
4 of respondents, dismissing the petition with prejudice as untimely.

5 DATED: September 22, 2009.  
6

7 

8  
9 

---

HOWARD D. MCKIBBEN  
United States District Judge  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28